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In The

Supreme Court of the United States

October Term, 1973

No. 73-1127

ALBERT VICTORY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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Reply to People's Point I [1]

Seeking santuary in the practice commentary to McKinney's New York Penal Law, the District Attorney contends that the affirmative defense provision of the New York felony murder statute gives a defendant a chance to "fight his way out of a felony murder charge."[2] Inherent in that statement is the concept that the affirmative defense shifts to the defendant an intolerable burden constitutionally unacceptable in a criminal prosecution.

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[1] This issue is covered in Point I of our petition at 7-11.

[2] Respondent's Brief at 8.

Notably, the People have completely failed to rebut our claim that the affirmative defense was unconstitutionally applied in this case.[3] When the Court examines:

(1) both statements of the defendant Bornholdt which exculpate petitioner;

(2) the repeated denial of petitioner's motions for a separate trial;

(3) the trial court's admonition to petitioner's lawyer not to call Bornholdt as a witness or comment on his refusal to testify; and

(4) the total lack of evidence from any source other than Bornholdt by which petitioner could sustain the burden of proof assigned to him by the statute,

it will find irresistible the conclusion that the affirmative defense provisions were unconstitutionally applied to petitioner's case. For the state, while requiring petitioner to demonstrate his lack of knowledge that Bornholdt was armed and intended to shoot the deceased police officer, simultaneously denied him a separate trial or an opportunity to produce the very testimony which would have sustained the burden of proof imposed upon him.

The People's inability to explain these constitutional defects should help to persuade this Court that its review is necessary here. For clearly the state has exceeded the "limits of reason and fairness" in shifting this burden to petitioner. *Morrison* v. *California*, 291 U.S. 82, 88 (1934). For all these reasons, as well as those advanced in our petition, the Court should grant certiorari.

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[3] See Petition for Certiorari at 10-11.

Reply to People's Point III[4]

Overlooking this Court's clear instruction in *Jencks* v. *United States*, 353 U.S. 657 (1957),[5] the People argue that a state evidentiary rule may constitutionally limit the confrontation clause of the sixth amendment. This Court has, however, repeatedly and properly upheld the superiority of the constitutional right to confront one's accusers, unbound by restrictive state evidentiary rules. *Davis* v. *Alaska*, U.S. , 14 Cr.L. 3117 (February 27, 1974); *Douglas* v. *Alabama*, 380 U.S. 415 (1965); *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Turner* v. *Louisiana*, 379 U.S. 466 (1965); *Greene* v. *McElroy*, 360 U.S. 474 (1959); *Tha-Soo-yel-lee* v. *United States*, 167 U.S. 274 (1897).

Only three weeks ago this Court struck down a state evidentiary rule which prohibited the defense from inquiring into the criminal record of a juvenile, where his testimony was critical to the conviction. The facts in our case are equally compelling, for here Garcia was the principal witness who, if properly discredited as to his testimony regarding the most important fact raging in petitioner's case, would have dragged the People's case down with him. In *Davis* this Court reaffirmed the importance of an unfettered defense right to cross-examine the state's witnesses:

> "Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' *perceptions* and *memory*, but the cross-examiner has

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[4]This issue is covered in Point II of our petition at 12-14.

[5]The New York Court of Appeals adopted the *Jencks* rule in *People* v. *Rosario*, 9 N.Y. 2d 286, 213 N.Y.S. 2d 448 (1961).

> traditionally been allowed to impeach, *i.e.*, discredit the witness." (14 Cr.L. at 3120; emphasis added.)[6]

Of special relevance here is the Court's awareness in *Davis* that:

> "We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof . . . of petitioner's act.' *Douglas* v. *Alabama*, *supra*, 380 U.S., at 419. The accuracy and truthfulness of Green's testimony was a key element in the State's case against petitioner." (14 Cr.L. at 3120)

And in *Davis* this Court did not hesitate to reverse the state's high court determination that the cross-examination permitted was adequate to show the witness' bias and prejudice. Where defense counsel, as in our case, was cut short in the middle of his effort to show the jury why the witness should not be believed, this Court observed:

> "On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness. . . . ." (14 Cr.L. at 3120)

In *Davis* the Court confirmed the right of the defense to expose facts from which the jury, as exclusive trier of the facts, could infer the witness' unreliability. Our case is identical to the *Davis* situation, and the holding in that case applies here with equal effect:

> "Petitioner was thus denied the right of effective cross-examination which 'would be constitutional error of the

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[6]The People, even at trial, have never claimed that defense counsel's attempt to discredit Garcia through the use of his prior inconsistent statements was in any way repetitive or unduly harassing cross-examination.

> first magnitude and no amount of showing of want of prejudice would cure it.' . . ." (14 Cr.L. at 3120-3121)

As they did in the Court of Appeals, the People have again introduced an argument not made in the lower court, suggesting here for the first time that there were "three" statements made by Garcia. The third "statement" was not a statement at all, but rather notes made by an Assistant District Attorney prior to his stenographically recorded question and answer statement taken from Garcia.[7] The notes were never adopted by Garcia in any way and never signed by him. Since it is undisputed that Garcia never mentioned the kneeing incident in either of his *statements*, the reference to a kneeing incident must have been added to the notes at a later date.[8]

Actually, Garcia never mentioned the kneeing incident in his statements. And that omission is one which should have been clearly before the jury as they assessed the accuracy and credibility of his testimony. Moreover, the record demonstrates that Garcia thought his attention was directed toward the alleged kneeing incident when he gave his statements. Thus, the rule adopted by the Court of Appeals bears no relationship to the primary question, namely whether the jury should be permitted to ascertain the witness' credibility and reliability on the basis of the omissions *whether or not his attention was directed to the particular fact subsequently related at trial.*[9] It is for the jury to determine, based upon all of the witness'

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[7]These notes, although available at trial, were never turned over to the defense pursuant to the *Rosario-Jencks* rule.

[8]We are reluctant to attribute to a prosecutorial office held in such high esteem an error so grave that the Assistant District Attorney would have omitted from a comprehensive question and answer type statement all reference to the alleged act that would have been critical to the homicide.

[9]We do not suggest that the People should not disclose to the jury, if they can, that the witness' attention was not directed to the alleged fact. Here, of course, Garcia told the jury he thought his attention had been directed toward the alleged kneeing incident.

testimony, whether the glaring omission comported with credibility, reliability and accuracy.

The rule adopted by the Court of Appeals, based as it is upon terribly weak reasoning and authority, directly violates petitioner's sixth amendment right to confront the chief prosecution witness. For all these reasons, as well as those advanced in our petition, the Court should grant certiorari.

Reply to People's Point II[10]

Conceding, as he must, that the defendant Bornholdt would not testify in a joint trial with petitioner, the District Attorney fashions a blind to divert the Court's attention by suggesting the "state ground" of untimeliness required the denial of a separate trial. However, no amount of prosecutorial rhetoric can obscure the fact that until Bornholdt was certified as capable of standing trial, petitioner was well within his rights in declining to disclose the nature of his defense.[11] Thus, the timeliness of petitioner's motion must be measured not from the moment he obtained evidence useful to his defense, but rather from that point in time where a joint trial was imposed upon him.

The most salient weakness in the People's argument is the total absence of any prejudice occasioned by a separate trial. Nowhere do the People suggest that they would be unable to try the defendant separately or that it would be inconvenient to do so.

The prosecution, as they did below, instead attempts to blink away Bornholdt's statement at sentencing[12] and contends that

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[10]This issue is covered in Point III of our petition at 14-17.

[11]We are constrained to remind the Court that petitioner's counsel moved for a separate trial on the ground that he had to call Bornholdt as a witness only when it was clear Bornholdt was going to be tried jointly with petitioner.

[12]At sentencing Bornholdt said:

> "I would like to say Albert Victory never knew I had the gun with me and I was insane at the time." (3511)

Bornholdt's written statement did not assist petitioner. The written statement could not be less neutral, for the first sentence states:

> "Albert Victory had nothing to do with the shooting of the police officer on October 7, 1968 outside the club Arthur." (130A)

Suggesting that the statement contains a defense and is, therefore, not a statement against Bornholdt's penal interests, the People commit a two-fold error. First, the jury should have been permitted, in a separate trial, to determine the significance of Bornholdt's full statement. Secondly, the evidence showed that Bornholdt had "pounced" on the police officer before the officer clubbed him with his nightstick, and that Bornholdt drew his gun on the officer before the latter shot at Bornholdt. Thus, in context the statement clearly contains no defense and is obviously against Bornholdt's penal interest.[13] In the final analysis, the jury should have been permitted to determine, in a separate trial, the significance of Bornholdt's statements.

This felony murder conviction, achieved in a way one would have thought impossible in our generation, should cause this Court intense concern. Petitioner's rights were trampled beyond recognition when he was locked into a joint murder trial with a man he hardly knew, but who could have exonerated him in a separate trial.

The existence of two statements demonstrating petitioner's innocence, combined with the trial court's refusal to permit proper cross-examination of the state's key witness, effected a gross denial of confrontation and due process of law the likes of which should not be permitted anywhere in our judicial system.

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[13]The People's vagarant suggestion that Bornholdt's statement confirms their theory digs deep but comes up empty. They can search that statement from now until doomsday and they will never find in it any mention of an intent to escape.

Compounding the egregious constitutional errors committed in this trial was the requirement that petitioner prove his lack of knowledge that Bornholdt was armed and would shoot the police officer. The refusal to permit petitioner to call Bornholdt as a witness, or provide a separate trial, preordained petitioner's inability to meet the unconstitutional burdens of the affirmative defense provisions of the New York Penal Law.

For all these reasons, as well as those advanced in our petition, the Court should grant certiorari.

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